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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Pee Dee Regional Transportation
Authority,

Plaintiff,

vs.

The South Carolina Procurement Review
Panel, South Carolina Department of Health
and Human Services, South Carolina
Procurement Materials Management Office,
and LogistiCare Solutions,

Defendants.

Civil Action No. 2007-CP-40-1589

BOOK

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**PROPOSED ORDER DENYING PEE
DEE'S MOTION FOR TEMPORARY
INJUNCTION**

RECEIVED
CLERK OF COURT
FIFTH JUDICIAL CIRCUIT
RICHLAND COUNTY
SOUTH CAROLINA
MAY 11 2007

INTRODUCTION

The above-captioned matter came for hearing before the Honorable J. Michelle Childs, Judge of the Fifth Circuit on Plaintiff Pee Dee Regional Transportation Authority's ("Pee Dee") Motion for a Temporary Injunction, (captioned as a Motion to Stay). The parties appeared, represented by counsel, initially on May 2nd and again on May 4th for oral arguments.

Pee Dee has appealed to this Court for judicial review of an administrative decision made by the South Carolina Procurement Review Panel pursuant to South Carolina Code § 11-35-4410. Because this Court finds that Pee Dee has failed to demonstrate irreparable harm or an inadequate remedy at law, and that the balance of harms falls against Pee Dee, Pee Dee's Motion is denied.

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FACTS AND PROCEDURAL POSTURE

The underlying state contract that is the subject of Pee Dee's appeal is a contract awarded by the Department of Health and Human Services to provide non-emergency transportation services to Medicaid beneficiaries in the State of South Carolina. (Statement of the Contents of the Record and Certification, hereafter "Record," Exhibit 16, p. 20.) The solicitation divided statewide coverage into six regions allowing vendors to compete for as many or as few regions as they were able. (Record, Ex. 16, p. 48.) On January 23, 2006, the State opened the proposals, and on November 14, 2006, awarded four of the six regions to LogistiCare. (Record, Ex. 16, pp. 755 – 758.)

Thereafter, Pee Dee protested the award of one of LogistiCare's four awarded regions: Region V. (Record, Ex. 16, pp. 16 - 19.) In its protest letter to the Chief Procurement Officer ("CPO") of the Materials Management Office ("MMO") Pee Dee alleged nine separate claims. *Id.* After a hearing on December 14, 2006, the CPO found in favor of LogistiCare on all Pee Dee's protest grounds. (Record, Ex. 16, pp. 9 - 14.) In a decision published on December 27, 2006, the CPO found that Pee Dee "offered no evidence in support of its claim[s]." *Id.*

On January 8, 2007 at 6:59 pm, Pee Dee appealed to the Procurement Review Panel. (Record, Ex. 16, pp. 6 - 8.) In its appeal Pee Dee cited a single claim: "LogistiCare's proposal was non-responsive in that it failed to adequately inform the MMO of its corporate background and experience or alternatively MMO failed to adequately weigh information regarding LogistiCare's corporate background and experience." *Id.* at 7 - 8. The lack of information Pee Dee cites was "an investigat[ion]

by the State of Missouri for bid rigging in relation to the Medicaid contract in Missouri. The Missouri contract was cancelled four months after it was awarded." *Id.*

In its decision the Procurement Panel did not reach a decision on the merits of Pee Dee's claim, and instead followed existing Procurement Panel decisions and found the appeal time barred since it was submitted after 5:00 pm on the day the appeal is due. (Record, Ex. 1.)

On February 8, 2007, the Procurement Panel informed Pee Dee of its decision to dismiss the appeal on procedural grounds. (Record, Ex. 12.)

On March 9, 2007, more than a month after Pee Dee learned that it had lost its appeal on procedural grounds, Pee Dee filed the above-captioned action for judicial review and a "Motion to Stay." *Id.*

On April 2, 2007, almost a month after it filed its motion paperwork, and almost two months after it learned that LogistiCare's contract would be going forward, Pee Dee requested a hearing to stay the contract until a hearing on the merits.

On May 1, 2007, LogistiCare started performance on this contract.

In its brief, LogistiCare provided affidavits attesting to incurred costs totaling over \$260,000 to prepare for contract performance in Region V. (Aff. of Albert Cortina, Exhibit B, LogistiCare's Mem. Opp. to Temp. Inj.) These costs, as described, appear to be unrecoverable. *Id.*

Additionally, the Department has alleged in a supporting affidavit that enjoining contract performance now, after the start of performance, will likely have devastating affects on the intended beneficiaries to this contract. (Aff. of MuMin AbdulRazzaaq, Exhibit E, LogistiCare's Mem. Opp. to Temp. Inj.)

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Finally, LogistiCare alleged in supporting and undisputed affidavits that it had offered to allow Pee Dee to continue providing the same services it was providing in Region V at a contract rate that is 86% higher than the average rate Pee Dee collected under their prior contract with the Department of Health and Human Services for the same services. (Aff. of Kenneth Hoggard, Exhibit C, LogistiCare's Mem. Opp. to Temp. Inj.) There is also no evidence that Pee Dee could not operate in regions other than Region V—the sole region at issue under this Motion.

CONCLUSIONS OF LAW

The power of the court to grant an injunction is in equity. *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 545, 627 S.E.2d 687, 689 (2006) (citing *Doe v. South Carolina Med. Malpractice Liability Joint Underwriting Ass'n*, 347 S.C. 642, 557 S.E.2d 670 (2001)). The court will reserve its equitable powers for situations when there is no adequate remedy at law. *Id.* (citing *Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n*, 298 S.C. 179, 379 S.E.2d 119 (1989)).

The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. *Strategic Resources*, 367 S.C. at 544. For a temporary injunction to be granted, the moving party must establish that: (1) it would suffer irreparable harm if the injunction is not granted; (2) the party seeking injunction will likely succeed in the litigation; and (3) there is an inadequate remedy at law. *Id.* at 545. The remedy of an injunction is a drastic one and ought to be applied with caution. *Id.* at 544. In deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant,

and grant an injunction which seems most consistent with justice and equity under the circumstances of the case. *Id.*

I. Pee Dee Has Failed to Demonstrate Irreparable Harm.

Pee Dee has alleged irreparable harm to "business and professional practice" if they are not granted a temporary injunction. However, Pee Dee has presented no evidence that its' "referral base would erode and potentially disappear" if it is not granted relief. *E.g. Levine v. Spartanburg Regional Services Dist., Inc.*, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005). The customers served under this contract will be served by whatever vendor is awarded this contract. There can be no loss of customers. There is also insufficient evidence that Pee Dee will suffer any other harm that cannot be remedied by monetary damages.

II. Pee Dee Has An Adequate Remedy Under The Law.

Pee Dee's standing in the action comes not as the incumbent services provider, but as an alleged aggrieved bidder under S.C. Code Ann. § 11-35-4210(1). Therefore, the only relief it could gain is afforded by Title 11, Chapter 35. The State has already cancelled its contract with Pee Dee and awarded a contract to Logisticare. Pee Dee has no claim for relief on continued performance, only the remedies allowed by Section 11-35-4310(3). Should this Court find, after a hearing on the merits, that the Procurement Panel made an error of law, and if Pee Dee is successful before the Panel in a hearing on the merits, Pee Dee's remedies will be the same, whether or not this court grants an injunction. *See Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 603 S.E.2d 905, (2004); *Riverwoods, LLC, v. County of Charleston*, 349 S.C.

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378, 563 S.E.2d 651 (2002) (injunction inappropriate where adequate remedy at law exists).

III. The Harm to LogistiCare Far Outweighs Any Inconvenience to Pee Dee .

In balancing the potential harm to the defendants, the court "will balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction or award damages as seem most consistent with justice and equity under the circumstances of the case." *Strategic Resources*, 367 S.C. at 544 (citing *Forest Land Co. v. Black*, 57 S.E.2d 420, 426 (S.C.1950)). LogistiCare's offer of harm is great: tremendous sunk costs and loss of goodwill and confidence with those parties it has contracted with in support of this contract. The Department also cites tremendous harm to itself and the citizens who are served under this contract. The Department staff that formerly arranged non-emergency Medicaid transportation has been reassigned to other duties. Pee Dee, in contrast, has offered little evidence that it will suffer loss if its injunction is denied. While it has alleged loss of jobs, the only evidence before the Court is that Pee Dee is able to continue to perform the same services it had been providing, except as a subcontractor to LogistiCare instead of a direct vendor with the State. Justice and equity in this case falls with continued performance on the contract and the denial of Pee Dee's motion.

IV. The Court Makes No Finding on the Plaintiff's Likelihood of Success on the Merits or Defendant's Equitable Defenses.

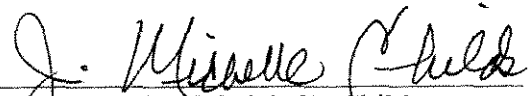
Finding the Plaintiff has failed to carry its burden on establishing an inadequate remedy at law, irreparable harm or on the balance of harms, the Court does not address the parties' arguments on the remaining elements at issue in this action.

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ORDER

1. Plaintiff's Motion is denied.
2. Defendants are awarded costs in accordance with S.C. Code § 15-37-10.

LET JUDGMENT BE ENTERED WITHOUT ANY UNDUE DELAY.



Honorable J. Michelle Childs
Judge of the Fifth Circuit
1701 Main Street
Columbia, SC 29202

Dated: June 19, 2007
Charleston, South Carolina